

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2729 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 to 5 No.

DR.HEMCHAND V PATEL

Versus

STATE OF GUJARAT

Appearance:

MR DK ACHARYA for Petitioner

MR.S.A.PANDYA,ADDL.PUBLIC PROSECUTOR for Respondent No. 1

MR PK JANI for Respondent No. 2

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 17/10/96

ORAL JUDGEMENT

Respondent No.2 filed a complaint on 15th June, 1985 in the Court of the learned Judicial Magistrate , First Class, Patan against the petitioner for having committed offences punishable under sections 337 and 338 of the Indian Penal Code. The respondent No.2 alleged that the petitioner, who is a Surgeon, while removing the stone from the Kidney, had damaged the rib and therefore

the petitioner was rash and negligent in performance of the operation and is therefore liable to be dealt with .

The learned Magistrate, on the same day, issued process against the petitioner. It appears that the petitioner challenged the said order of issuance of process by application being Miscellaneous Criminal Application No.162/89 under section 482 of the Criminal Procedure Code before this Court. This Court (Coram: R.A.Mehta,J.) on 3-3-89 allowed the said application and given the following direction :

"Therefore, the process issued by the learned Magistrate is required to be quashed and set aside with a direction that the question of issuing such process be postponed and the trial Magistrate may inquire into the case himself for the purpose of deciding whether there is sufficient ground for proceeding and thereafter pass appropriate orders regarding process in accordance with law."

In pursuance of the aforesaid direction, the learned Magistrate started inquiry under section 202 of the Code. It appears from the Rojkam that at the instance of the complainant (respondent No.2 herein) a notice was also issued to the petitioner to produce documents and on 30th May 1990, the petitioner had in fact filed a reply. However, on 17-7-90, it appears that the petitioner as well as respondent No.2 did not remain present and, therefore, the learned Magistrate issued summons for the offences punishable under sections 337 and 338 of the Indian Penal Code against the petitioner and fixed the case for recording evidence. The petitioner has challenged the said order in the present application.

It is contended by Mr. Acharya, learned Advocate appearing for the petitioner, that the order issuing summons to the petitioner and to fix the case for recording evidence is contrary to the direction given by this Court. In the submission of Mr. Acharya as the learned Magistrate has not decided whether there is sufficient ground for proceeding against the petitioner, the question of issuing summons against him does not arise. There is substance in the submission of Mr. Acharya. As per the direction given by this Court in Miscellaneous Criminal Application No.162/89 the learned Magistrate is required to inquire into the case for the purpose of deciding whether there is sufficient ground for proceeding against the petitioner and thereafter to pass appropriate order for issuing process in accordance

with law . The learned Magistrate has already started inquiry under section 202 of the Code and for that purpose has also examined the complainant and called upon the petitioner to produce necessary documents and when the petitioner has filed the reply, the learned Magistrate ought to have considered the same and thereafter pass the appropriate orders whether there is sufficient ground for proceeding against the petitioner and whether it is a fit case to issue process. Having not done so and instead having straight way passed an order for issuance of summons to the petitioner and fixed the case for recording the evidence, in my view, the learned Magistrate has committed an error.

In the result the application is allowed. The learned Magistrate is directed to decide the question whether there is sufficient ground for proceeding against the petitioner and thereafter to pass appropriate orders for issuance of process in accordance with law. In view of the fact that the complaint is of 1988, the learned Magistrate shall hear and decide the aforesaid question within four weeks from the receipt of the writ of this Court. Rule is made absolute accordingly with no order as to costs.

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